Targeted financial sanctions: what if the target is wrong?

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SANCTIONS HAVE BEEN AN IMPORTANT mechanism in the efforts – by the UN, EU and individual states – to promote international peace and security. Since the early 1990s, and following the experience of implementation of comprehensive sanctions against Iraq, increasing use has been made of so-called targeted sanctions – measures taken against named individuals or entities. The hope has been that targeted sanctions will be both more effective in achieving the desired outcomes, while at the same time reducing the adverse impact on the general civilian population in the target state.

Although there is considerable scope for argument on how effective sanctions actually are (for example the House of Lords select committee on economic affairs concluded in a 2007 report that economic sanctions could contribute to achieving objectives when combined with other foreign policy measures, albeit that sanctions would usually play a subordinate role, but also concluded that sanctions could be counterproductive and lead to target regimes increasing its internal control over resources), one key issue is to ensure that the correct target is hit and, conversely, that if the wrong target is hit, steps can be taken to remove the sanctions against the individual or entity.

It has widely been recognised that there has been significant problem here – as long ago as 2005 the UN General Assembly called on the UN Security Council '... to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them...', but only very slow progress has been made. However, recent developments, including in particular litigation in the Court of Justice of the European Communities, have taken matters forward, albeit the process is far from complete. This article considers the routes of challenge at UN and EU level in light of those recent developments.

THE ROUTES OF CHALLENGE: THE UN

Other than in relation to the al-Qaeda sanctions regime where, as set out below, the UN has established the Office of the Ombudsperson, the route of challenge at UN level is through what is called the 'Focal Point' to receive de-listing requests. This was established as a result of resolution 1730 (2006) and, as its title suggests, is simply a central point for receiving de-listing requests. The procedure followed is as set out in resolution 1730 (2006) but, as far as a petitioner for de-listing is concerned, it is an opaque and unsatisfactory process. In particular: the process does not involve disclosure to the petitioner of any evidence relied on to justify continued inclusion in the sanctions list; provides no standard against which requests for de-listing are to be considered; the process requires only a single member state represented on the relevant sanctions committee to object to de-listing in order for the designation to on the list to remain in place; and, the process places no obligation on the sanctions committee to explain why it has refused a request for de-listing.

Despite these major disadvantages, an application for de-listing through the Focal Point can succeed. In its most recent report, covering the period to 14 August 2012, the Focal Point said that it had completed dealing with 61 requests for de-listing, which had resulted in 13 individuals and 17 entities being removed from sanctions lists but 26 individuals and 18 entities had remained designated.

In relation to the al-Qaeda sanctions list, by resolution 1904 (2009) the Security Council created the Office of the Ombudsperson. This has resulted in a substantial improvement in the fairness of the process for de-listing, although there remain significant problems. Probably the two most important areas of progress have been in relation to the standard to be applied to de-listing requests and what is called 'dialogue with petitioner'.

The Ombudsperson has published, as part of a report to the Security Council, her working methods and in relation to standards has said:

> '... in my view, the standard for the Ombudsperson's analysis and observations should be whether there is sufficient information to provide a reasonable and credible basis for the listing. "Sufficiency" provides the necessary flexibility in terms of assessing different types of information from different sources, quantitatively, qualitatively and in substance. The

> criteria of "reasonableness and credibility" ensure that the combined circumstances provide a rational basis for the listing, which is reliable enough to justify the imposition of the sanctions measures... In my opinion, it is a standard which recognises a lower threshold appropriate to preventative measures, but sets a sufficient level of protection for the rights of individuals and entities in this context'.

In relation to 'dialogue with the petitioner', what is most important is that through the Ombudsperson, the petitioner for de-listing gets at least some of the information about the case against them (subject to issues of confidentiality) and so has the opportunity to respond to that case and provide information that is reflected in the Ombudsperson's report to the relevant sanctions committee.

Although these are significant improvements over the Focal Point process, the major difficulty remains that the decision on de-listing rests with the sanctions committee itself (informed by a report to them, with a recommendation, by the Ombudsperson) and that there has to be unanimity in the sanctions committee before de-listing can take place. In addition, the Ombudsperson has reported that although she has generally received co-operation from states in providing relevant information to her, there have been difficulties with access to confidential information in some cases. She has also pointed to the limitations of her role – she can only deal with requests for de-listing and not for requests for exemptions which, in general terms, must be submitted to the sanctions committee through a state – individuals or entities do not have the right of direct presentation of a request for an exemption.

THE ROUTES OF CHALLENGE: THE EU

The EU can apply sanctions either through implementation of the UN Security Council resolutions in accordance with chapter VII of the UN charter or, separately and on its own account, in pursuit of the specific objectives of the common foreign and security policy as set out in the treaty of the European Union. EU measures are implemented through regulations which have direct effect.

There have been a stream of cases in the General Court (Court of First Instance) and Grand Chamber dealing with a variety of challenges. A number of the most recent decisions have advanced the opportunities to challenge inclusion on a sanctions list.

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In *Tay Za v Council (Appeal)* [2012], the Grand Chamber considered an appeal by Mr Tay Za as to the competence of the EU to include him on the list of persons subject to a regulation imposing sanctions in respect of Burma/Myanmar. The regulation froze the funds and economic resources belonging to members of the government of Myanmar or belonging to any natural or legal person associated with them. Mr Tay Za's father is a prominent businessman in Burma/Myanmar and associated with the regime there. The Court's case law established that it was in principle permissible for the EU to implement regulations that targeted not just the members of the government in Myanmar but also individuals and entities who benefited from the economic policies of the government. However, the Court determined that it was unlawful to include natural persons on a sanctions list where the ground for the inclusion was simply their family connection with persons associated with the leaders of the country concerned.

What was necessary to give competence to include an individual such as Mr Tay Za on a sanctions list, the Court decided, was 'precise, concrete evidence', which would have enabled it to be established that the specific individual benefited from the economic policies of the leaders of Burma/Myanmar – a mere family connection with someone who benefited was not enough. Since that 'concrete evidence' was not available, the regulation so far as it applied to Mr Tay Za was annulled for want of legal basis.

In *Fulmen v Council* [2012], the General Court considered the nature of the reasons that had to be given by the European Council to individuals or entities that had been placed on a sanctions list and also the nature of the evidence that the Council needed to rely on if a de-listing request was refused. The sanctions regime applicable in the *Fulmen* case had been introduced in order to apply pressure on Iran to end proliferation/sensitive nuclear activities and the development of nuclear weapon delivery systems.

Fulmen, an Iranian company active in the electrical equipment sector and its majority shareholder/chairman of its board of directors were included in the list of persons and entities whose funds and economic resources were to be frozen. The reason given for including Fulmen in the sanctions list was because it was involved in the installation of electrical equipment on the Qom/Fordoo site before its existence had been revealed. The Court held that this was sufficient to meet the obligation to state reasons. The Court said:

> '...in particular, the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him'.

It held that the reasons given, although brief, were sufficient – Fulmen could understand what it was accused of having done and so was able to dispute the truth or relevance of that.

In relation to the evidence, in a similar fashion to Tay Za, it was held that the Council must produce 'concrete evidence and information' to show that the grounds for including Fulmen on the sanctions list were supported. The Court made it clear that even if the evidence concerned came from confidential sources, which might

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possibly justify restrictions in relation to the communication of that evidence to the individual applicants or to their lawyers, the evidence had to be made available to the court. The Council could not include an individual or entity on a sanctions list where the member state who had brought forward information to justify inclusion on that list was not prepared to allow that information to be communicated to the court. The Court also dismissed a claim that the Council had made that it could not be expected to produce proof of the involvement of Fulmen in nuclear proliferation, taking into account the clandestine nature of the alleged conduct. The Court acknowledged that difficulties in proving involvement might, in some cases, have an effect on the standard of proof required but the effect of such difficulties:

> '... cannot be that the Council is entirely relieved of the burden of proof which rests on it'.

Since in the particular case the Council had in effect admitted that it had relied on unsubstantiated allegations that Fulmen installed electrical equipment on the Qom/Fordoo site, the Court held that the evidence was insufficient and accordingly annulled the measure as regards Fulmen and its director.

THE ROUTES OF CHALLENGE: THE EUROPEAN COURT OF HUMAN RIGHTS

The most recent relevant decision has been that of the European Court of Human Rights in *Nada v Switzerland* [2012]. The Swiss measures challenged in the case had been introduced following a UN Taliban sanctions resolution. The effect of the measures on Mr Nada was stark: he is an Italian citizen, who lived in Campione d'Italia an Italian enclave within the Swiss Canton of Ticino, and the sanctions against him included a travel ban, which meant that he could not travel to the rest of Italy without a permit. He challenged the Swiss measure on the ground that it interfered with his rights under Article 8 of the European Convention on Human Rights (the right to respect for private and family life). By the time that his case was considered the European Court of Human Rights Mr Nada had in fact been removed from the sanctions list (in part, it appears, as a result of having used the Focal Point process) and that may have driven the conclusion reached by the Court, which was that there had been a breach of Article 8. In essence what was found – and although the Court was unanimous in finding an infringement of Article 8, there was a majority and two concurring opinions, each of which had different reasoning – was that there had been a failure by the Swiss authorities to consider adequately Mr Nada's individual circumstances and a failure to take such steps as were reasonably open to reduce as far as possible the serious impact that the measures had on Mr Nada's private and family life.

FURTHER DEVELOPMENTS?

It is highly likely that, driven by additional litigation, there will be further improvements in the ability to challenge inclusion on sanctions lists. It might be too much to hope that, at UN level, the role of the Office of the Ombudsperson could be extended to cover all sanctions regimes, but the recent cases have helped improve fairness and demonstrate a strong desire on the part of the courts to work towards achieving some kind of basic due process in de-listing cases.

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Fulmen v Council [2012] EU ECJ T-439/10

Nada v Switzerland [2012] ECHR 1691

Tay Za v Council (Appeal) [2012] EU ECJ C-376/10